

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3095

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH AXELSON,

Defendant-Appellant.

APPEAL from an order of the circuit court for Wood County:
EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Ralph Axelson appeals from an order denying his § 974.06, STATS., motion for postconviction relief. The trial court held that all of Axelson's claims had been unsuccessfully raised in his direct appeal. We agree, and affirm.

Axelson was convicted of theft and possession of burglarious tools. Axelson filed a motion for postconviction relief under RULE 809.30, STATS., and litigated a claim of ineffectiveness of trial counsel. An evidentiary hearing was held, and the court denied Axelson's postconviction motion. Axelson appealed to this court, and we affirmed the judgment of conviction and postconviction order. *State v. Axelson*, No. 92-0417-CR, unpublished slip op. (Wis. Ct. App. Sept. 9, 1993).

Other Acts Evidence

On direct appeal, Axelson challenged several aspects of his trial counsel's performance. Specifically, Axelson argued that counsel was ineffective because he did not object to the introduction of other bad acts committed by Axelson. This court held the decision to not object to the evidence was part of a broader trial strategy to discredit Leslie Spohn, a co-actor who had testified against Axelson. This court concluded that, although the strategy did not succeed, it was reasonable under the circumstances of the case. We rejected that portion of Axelson's ineffectiveness argument. *Id.*, slip op. at 7-9.

In this § 974.06, STATS., appeal, Axelson enumerates several items of "other acts" evidence which he asserts were improperly elicited by his trial counsel. Axelson faults counsel for eliciting the following information from Spohn: that Axelson had stolen a car, a well pump and a tarpaulin; that Axelson carried a gun and had threatened to kill someone; and that Axelson had committed two previous burglaries. We addressed each of those "other acts" on direct appeal. Axelson cannot relitigate this issue. *Beamon v. State*, 93 Wis.2d 215, 220-21, 286 N.W.2d 592, 595 (1980).

Withdrawal Of Counsel

On direct appeal, Axelson also complained that his trial counsel did not adequately impeach Spohn with inconsistent statements made by Spohn at an earlier parole revocation proceeding. A transcript of the revocation hearing was not available. However, Axelson argued that trial counsel should have introduced the inconsistencies through the testimony of counsel's wife,

who had attended the revocation hearing. This court held that the inconsistencies were "minuscule" and that it was "doubtful" that Spohn would have been impeached if the inconsistencies were brought to the jury's attention. *Axelson*, slip op. at 11-12.

In this appeal, Axelson argues that his trial counsel should have withdrawn so that he could testify to the inconsistencies between Spohn's trial testimony and his testimony at the revocation hearing. Except for a change in the prospective witness, now trial counsel and formerly counsel's wife, this argument was raised and rejected on direct appeal. Axelson cannot relitigate it. *Beamon*, 93 Wis.2d at 220-21, 286 N.W.2d at 595.

Due Process

Axelson also argues that the "cumulative effect of trial error" denied him due process. Axelson does not identify the "trial errors." To the extent that Axelson is referring to the above-discussed matters, he cannot relitigate them. To the extent that Axelson is referring to this court's holding on direct appeal that trial counsel's performance was deficient in some respects, we also held that Axelson had not been prejudiced by the performance. *Axelson*, slip op. at 14. Thus, the "cumulative effect" of counsel's conduct does not warrant any relief. As for any other unidentified "trial error," Axelson does not adequately develop an argument, and we do not address it. *Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

New Trial in the Interest of Justice

Lastly, Axelson asks this court to exercise its discretionary power of reversal under § 752.35, STATS., because the real controversy has not been fully tried. Axelson's supporting argument is merely a restatement of positions that we have already rejected. Therefore, we decline to order a new trial under § 752.35.¹

¹ We asked the parties to brief the question of whether *State v. Escalona-Naranjo*, 185

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

(..continued)

Wis.2d 168, 517 N.W.2d 157 (1994), "should be applied to a postconviction motion that was filed before issuance of that decision." Because each of Axelson's claims were litigated on direct appeal, and he cannot relitigate them, we need not address the applicability of *Escalona-Naranjo*.